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Supreme Court of the United States

OCTOBER TERM—1949

No.

GILBERT GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Gilbert Green, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made on July 14, 1949 (R. 69), which affirmed a judgment of the District Court for the Southern District of New York, holding the petitioner in contempt of Court.

Statement of the Matter Involved

The petitioner is a defendant in the case of the *United States* against *William Z. Foster, et al.,* C 128-87, now on trial in the District Court of the Southern District of New York before Judge Harold R. Medina. He has been enlarged on bail of $5,000 since his arrest following the return of the indictment on July 28, 1948. On June 20, 1949, the Trial Judge remanded the petitioner for "the remainder of the trial", because he commented critically on one of the Judge's rulings (R. 7).

The petitioner was testifying during the defendants' case. In the course of an extended colloquy concerning the admissibility of certain documentary evidence, the petitioner said: "I thought we were going to be given a chance to prove our case. That article was germane to the very heart of the issue" (R. 7).* The Court thereupon held him in contempt and imposed punishment. Pursuant to Rule 42(a), Federal Rules of Criminal Procedure, a judgment, commitment and certification were filed the same day. The certificate discloses that the contempt was predicated not only upon the remark made by the petitioner on June 20th, but upon other incidents, involving other defendants, which had occurred as early as May 18, 1949, during the course of the same trial, characterized as "a pattern of misconduct in which the defendant and his co-defendants have engaged for a considerable period of time, as set forth, in part, in the June 8, 1949, orders and certificates, in *United States* v. *Henry Winston* and *United States* v. *Gus Hall*" (R. 15, 16). Appeal was taken to the United States Court of Appeals for the Second Circuit. The appeal was argued on July 1, 1949, and an order was made on July 14th, unanimously affirming the order and judgment below.

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* The proffered exhibit is an article of which the petitioner was co-author and entitled "Notes on American Democracy". The article was later received in evidence as Defendants' Exhibit BBBBBBB-1 (Tr. of Record, *U. S.* v. *Foster et al.,* at p. 9278).

Jurisdiction

The judgment of the Court of Appeals was entered July 14, 1949 (R. 69). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1945, Title 28, U. S. C., Section 1254.

Statutory Provisions and Rule Involved

Title 18, U. S. C., provides in respect to contempt as follows:

> "401. Power of Court.
>
> A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 42(a), Federal Rules of Criminal Procedure, provides:

> "Rule 42. Criminal Contempt.
>
> (a) Summary Disposition. A criminal contempt may be punished summarily if the Judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the Judge and entered of record."

Questions Presented

1. Whether the statement made by the petitioner during the course of the trial constituted a contempt of Court.

2. Whether the Trial Court could find the petitioner guilty of a contempt of Court because of the conduct of other defendants at other times during the trial.

3. Whether the sentence of imprisonment here imposed, i.e., "for the remainder of the trial", considered in the circumstances of this trial, possess the definiteness and certainty of duration and character required by law.

4. Whether such sentence imposes upon petitioner a quality and degree of pressure and compulsion which so curtails the full, free and unobstructed presentation of their defense as to deprive them of their constitutional rights under the Fifth Amendment.

Opinions Below

There was no opinion rendered by the District Court Judge. The opinion of the Court of Appeals is to be found at R. 61.

Specification of Errors

1. The Court of Appeals erred in finding that the petitioner Green had committed an act constituting contempt of Court.

2. The Court of Appeals erred in finding that the acts of other defendants at other times could be imputed to the petitioner to find him guilty of contempt of Court.

3. The Court of Appeals erred in holding that the Trial Judge properly remanded the petitioner "for the remainder of the trial" as punishment for contempt of Court.

Reasons Relied On for Allowance of the Writ

This petition presents two questions of Federal law, important to the administration of federal justice, one of which has been decided by the Court of Appeals in a manner probably in conflict with applicable decisions of this Court; the other is a question which has not been, but should be, settled by this Court. The first is whether an objection to the ruling of a Trial Judge, by a defendant while on the witness stand, can constitute a contempt of Court, either standing alone or in the light of other comments uttered by his co-defendants at other times during the trial. The second is whether the Trial Court commands the power, under the statute, to remand the petitioner "for the remainder of the trial" as punishment for such conduct.

1. The legislative history of the statute conferring upon the federal judiciary the power to punish contempts of Court summarily, and the decisions of this Court construing the statute, demonstrate that it was never intended to protect Judges from objection by this means. *Cooke* v. *United States,* 267 U. S. 517, 539; *Nye* v. *United States,* 313 U. S. 33; Frankfurter and Landis, *Power of Congress over Contempt,* 36 Harvard Law Rev., p. 1027. The power is not inherent; its exercise is permitted only to the extent prescribed by statute and only to protect the Courts against actual interference. *Nye* v. *United States, supra; In re Michael,* 326 U. S. 224. The statute has never been construed to embrace an act merely because it might deter the judicial process. *In re Michael, supra.*

2. If the petitioner's mild and obviously spontaneous comment, made after weeks of an arduous trial, could not be fairly considered contumacious in the light of these expressions by this Court, it could not be made to assume the character of a contempt by reference either to what his

co-defendants had done at other times or to a fancied pattern of misconduct. Contempts should be judged as they occur and an act which is not a contempt in itself cannot be made such by other acts. *Pendergast* v. *United States*, 317 U. S. 412, 420. Nor could the petitioner be punished for the acts of his co-defendants without abandonment of the principle of personal guilt for the doctrine of guilt by association. *Bridges* v. *Wixon*, 316 U. S. 135, 163 (Murphy, J.).

The Court of Appeals disregarded these decisions of this Court and decided these questions in a manner probably in conflict with them.

3. Was the imprisonment here imposed, i.e., "for the remainder of the trial", a sentence definite and certain as required by law? The Court of Appeals decided it was, erroneously, we contend. The requirement of definiteness in punitive, as distinctive from coercive, contempt is well established. *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418; *Wilson* v. *U. S.*, 65 F. 2d 621; *U. S.* v. *Dochis*, 36 F. 2d 601. The contempt sentence "must name a definite period of imprisonment", 13 Corpus Juris 85 and cases there cited. This sentence being punitive is not definite according to the intent of the cases just cited. Its duration depends upon a series of factors so imponderable and unpredictable as to deprive it of all lawful and rational relation to the offense for which it was purportedly imposed. The illness of a juror or witness, protracted rebuttal by the Government the time other defendants consume in presentation of their cases and many other contingencies not difficult to imagine must thus determine the duration of petitioners' imprisonment.

Indeed, by thus making the term of this sentence coextensive with the Government's own rebuttal and cross-examination of the defense witnesses, the Court has, in effect, delegated his judicial sentencing power to the Government prosecutor and has thereby run afoul of this Court's decision in *Tumey* v. *Ohio*, 273 U. S. 510.

Nor is this sentence little different than an imprisonment "until further order of the Court" held to be invalid for want of definiteness in *State ex rel. Grebstein* v. *Lehrman*, 129 So. 818, and *People* v. *Pirfenbrink*, 96 Ill. 68.

The "indeterminate sentence" cases cited by the Court of Appeals do not alter this result. There the mathematical maximum satisfied the requirement of definiteness. Again, unlike here, the indefiniteness is there occasioned by a purpose to rehabilitate, not to punish.

4. Does this sentence compel such a curtailment of the free and unobstructed presentation of petitioner's defense as to be an unconstitutional deprivation under the Fifth and Sixth Amendments?

Whether or not intended, the effect of such a sentence is to pressure petitioner, on pain of continued imprisonment, to hurry his defense to a close. His access to and consultation with counsel and his co-defendants are seriously curtailed. Thus, this sentence is not only inherently indefinite but its duration is in effect limited upon petitioner's involuntary surrender or, serious impairment of constitutional rights which are indispensable to anyone under trial, as they are, for a serious crime. We submit that no sentence should be permitted to stand whose duration, aside from its quantitative uncertainty, is conditioned upon consequences of this character. In the circumstances, we submit that the principle of "undue burden" upon the free exercise of a constitutional right, is not inapplicable. *Grosjean* v. *American Press Publishing Co.*, 297 U. S. 233.

Prayer

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court and that the judgment and decision of the Court of Appeals may be reversed and your petitioner granted such other and further relief as may be just and proper.

Dated, August 11, 1949.

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